Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE OHIO CASUALTY INSURANCE COMPANY,
Petitioner,

v.

DOWNEY SAVINGS AND LOAN ASSOCIATION,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Of Counsel:

GEORGE C. MONTGOMERY
BRUCE M. THORNTON

MONTGOMERY, GASCOU, GEMMILL
& THORNTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

33 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. *Bankers Life* As Applied To Question 1—The Excessive Fines Clause Issue	1
1. *The legislatures of the several States have had ample opportunity to address the injustices associated with unlimited and excessive punitive damage awards*	2
2. *The California courts have had ample opportunity to consider constitutional challenges to punitive damage awards as a matter of state and federal law and have consistently rejected such challenges*	5
B. *Bankers Life* As Applied To Question 2—The Change-in-Standards Issue	7
C. *Bankers Life* As Applied To Question 3—The Procedural Rights Issue	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Aetna Life Insurance Co. v. *Lavoie*, 475 U.S. 813 (1986)	3,8
Bankers Life and Casualty Company v. *Crenshaw*, No. 85-1765 (May 16, 1988)	*passim*
Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)	2
Electrical Workers v. *Foust*, 442 U.S. 42 (1979)	2,8
G. Amador Corp. v. *The Ohio Casualty Insurance Company*, No. B 029795 (Cal. Ct. App., 2d Dist., app. filed Aug. 27, 1987)	4-5
Gertz v. *Robert Welch, Inc.* 418 U.S. 213 (1983)	2
Gilliard v. *Mississippi*, 464 U.S. 867 (1983)	5
Illinois v. *Gates*, 462 U.S. 213 (1983)	2
Ingraham v. *Wright*, 430 U.S. 651 (1977)	5
Mishkin v. *New York*, 383 U.S. 502 (1966)	3
Procunier v. *Navarette*, 434 U.S. 555 (1978)	7
Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971)	2
Smith v. *Wade*, 461 U.S. 30 (1983)	2,4

CONSTITUTION, STATUTES AND RULES:

FEDERAL CONSTITUTION AND RULES:

Art. I, § 10 (Contracts Clause)	3
Eighth Amendment (Excessive Fines Clause)	*passim*
Fourteenth Amendment (Due Process Clause)	*passim*
Rule 22.6, Rules of the Supreme Court	1

CALIFORNIA STATUTES:

Cal. Civ. Code § 3294	5,7

Table of Authorities Continued

Page

MISCELLANEOUS:

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1 (1982) 3

Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984) 3

Walther & Plein, *Punitive Damages: A Critical Analysis*, 49 Marq. L. Rev. 369 (1966) 3

SUPPLEMENTAL BRIEF OF PETITIONER

This Supplemental Brief is filed pursuant to Rule 22.6 of the Court's Rules for the purpose of addressing certain issues raised by this Court's decision on May 16, 1988 in *Bankers Life and Casualty Company* v. *Crenshaw*, No. 85-1765.

A. *Bankers Life* As Applied To Question 1—The Excessive Fines Clause Issue

In *Bankers Life*, the Court concluded "that the appellant's Eighth Amendment challenge, like its other challenges to the size of the punitive damage award, [had not been] properly raised below." Slip op., at 6 (footnote omitted).

This case presents *none* of the jurisdictional problems which led to the Court's decision not to reach the Excessive Fines Clause question in *Bankers Life*. In its appeal to the California Court of Appeal, petitioner explicitly raised a federal constitutional challenge under the Eighth Amendment's Excessive Fines Clause to the size of the punitive damage award. (For the convenience of the Court, pertinent excerpts from the main briefs of petitioner and respondent addressing the Excessive Fines Clause question in the California Court of Appeal are reprinted, in full, in Appendices A and B, respectively, *infra*.) Petitioner's challenge was squarely rejected by the court below based upon a decision of this Court. Pet. Cert., App., at 30a. Thus, it is indisputable that petitioner's Eighth Amendment claim was "raised and passed upon in state court," *Bankers Life*, slip op., at 4, and there is therefore no *jurisdictional* bar to the Court's consideration of that issue in this case.

In *Bankers Life*, the Court articulated several prudential considerations which, in light of the " 'great public im-

portance of the issues involved,' " slip op., at 7, *quoting Illinois* v. *Gates*, 462 U.S. 213, 224 (1983), persuaded the Court not to reach the Excessive Fines Clause question *in that case*. Although the Court's power to reach that issue in the case at bar cannot seriously be disputed, those prudential considerations do not support a declination by the Court to review petitioner's properly presented, important constitutional claims in this case even if those considerations were otherwise thought to be relevant.

1. ***The legislatures of the several States have had ample opportunity to address the injustices associated with unlimited and excessive punitive damage awards.***

In *Bankers Life*, the Court noted the possibility that Mississippi's legislature "might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims . . . ." Slip op., at 7-8 (footnote omitted). Although any state legislature might theoretically enact legislation addressing the size of punitive damage awards at any time, that uncertain contingency provides no basis for declination by this Court to review the substantial constitutional deprivation experienced by petitioner in this case and passed upon by the California courts.

For many years, this Court and individual Justices have, in a series of cases and largely *sua sponte*, articulated substantial concerns regarding the inequities and capriciousness of large, uncontrolled and random punitive fines in civil cases.[1] Scholars and other commentators have been

---

[1] *See, e.g., Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (Marshall, J.); *Smith* v. *Wade*, 461 U.S. 30, 57-65 (1983) (Rehnquist, J., dissenting); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan, J., dissenting).

expressing similar concerns for decades.[2] Three years ago, in June, 1985, the Court sent an even clearer signal regarding these concerns when it set for argument *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), in which two of the questions presented pressed similar constitutional challenges to the punitive damage system.

On April 22, 1986, in a message that was neither obscure nor equivocal, this Court gave the legislative and judicial branches of the several States an unmistakably clear signal that out-of-control punitive fines in civil cases raised "important" federal constitutional questions under the Excessive Fines Clause, the Due Process Clause and the Contracts Clause that, "in an appropriate setting, *must be resolved.*" *Id.*, at 828-29, (emphasis added). State legislatures do not, of course, resolve such federal constitutional issues; this Court does.[3]

On March 9, 1987, the Court noted probable jurisdiction in *Bankers Life*, thereby again agreeing to consider Excessive Fines, Due Process and Contract Clause federal constitutional challenges to the punitive damage regimes that exist in virtually all jurisdictions. One year later, in determining not to review those questions in *Bankers Life*, the Court for the fourth consecutive year signaled that it regarded those challenges as " 'far-reaching and important.' " Slip op., at 7, *quoting Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966).

---

[2] *See e.g.*, Sales & Cole, *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984). Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1 (1982); Walther & Plein, *Punitive Damages: A Critical Analysis*, 49 Marq. L. Rev. 369 (1966).

[3] It bears noting here that on January 13, 1986, more than four months prior to the Court's issuance of this warning to the States in *Aetna*, petitioner filed its opening brief in the Court of Appeal presenting these same constitutional issues to that court.

If the Court agrees to review petitioner's essentially identical federal challenges to the constitutionality of the $5,000,000 punitive fine assessed against it, the matter will be briefed, argued and decided during the Court's 1988 Term. By the time any decision could be rendered, state legislatures will have had nearly four years of relatively wide-spread, unambiguous notice that these issues, at some time, "must be resolved."

While fully cognizant of the importance of this Court's discretion over its docket, petitioner respectfully submits that justice cannot be done to petitioner and many other similarly situated litigants if its important constitutional claim is shelved in order to allow state legislatures more time to deal prospectively with a problem which is causing incalculable present injury. Prior to this Court's decision in *Aetna*, petitioner raised and briefed these issues as well and fully as the Court could possibly expect given the novelty of these challenges. *See* App. A, *infra*, at 1a-9a. Respondent joined issue on the merits and the court below resolved this issue against petitioner on the basis of an opinion of this Court which petitioner contends should not preclude the relief it seeks. Respondent has no constitutional entitlement to the $5,000,000 windfall assessed against petitioner. Punitive damages address the wrong to society and should, in theory, be paid to the State, *see Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). There are no equities which favor allowing respondent to retain its unearned, extra-compensatory $5,000,000 bounty simply to permit additional opportunity to allow for the remote possibility the California legislature might someday correct the inequities in the punitive damage system for future potential victims of that system.

It would be particularly unjust to allow this petitioner's constitutional claim to go unreviewed. About the time this petition was filed in this Court, another California jury has imposed yet another punitive damage award against petitioner in the amount of $10,000,000. *G. Amador Corp.*

v. *The Ohio Casualty Insurance Company*, No. B 029795 (Cal. Ct. App., 2d Dist., app. filed Aug. 27, 1987). Thus, petitioner is facing $15,000,000 in fines under California's punitive damage system. Neither petitioner nor other victims of California's regime of massive punitive damages, *see* Br. of California Bankers Ass'n as *Amicus Curiae* in Support of Petitioner, should be required to submit to such overpowering burdens without the opportunity for review by this Court of their legitimate and important federal constitutional defenses. The need for this Court's intervention is as urgent as it is obvious.[4]

2. ***The California courts have had ample opportunity to consider constitutional challenges to punitive damage awards as a matter of state and federal law and have consistently rejected such challenges.***

In *Bankers Life*, the Court attached some importance to the Mississippi Supreme Court's having the opportunity to decide the questions of federal law which this Court declined to address. In the case at bar, the California courts have had that opportunity. As noted above, the Excessive Fines Clause question was fully briefed to the Court of Appeal by both petitioner and respondent. That court's cursory response to this "important and difficult" question was possibly based on respondent's assertion in its brief to that court that, "Despite the fact that for more

---

[4] State legislatures, no less than state courts, may well continue to ignore the seriousness of the constitutional issues raised by unlimited punitive damage awards because of the perception that this Court's own precedent leaves them free to do so in enacting statutes such as *Cal. Civ. Code* § 3294. The Court of Appeal felt so constrained, as indicated by its reliance on this Court's decision in *Ingraham* v. *Wright*, 430 U.S. 651, 664-66 (1977), said by the Court of Appeal to establish that the Eighth Amendment "applies only to criminal actions . . . ." Pet. Cert., App. A, at 30a. Respondent repeats this talismanic assertion in this Court. Br. in Opp., at 20. As Justice Marshall has observed, such "limiting precedent in this Court inhibits doctrinal development in the States." *Gilliard* v. *Mississippi*, 464 U.S. 867, 870 (1983) (Marshall, J., dissenting from denial of certiorari).

than a century punitive damages awards have consistently survived constitutional assault, [Ohio Casualty] would have this Court completely ignore this unbroken line of precedent." App. B, *infra*, at 10a.

Although not required to do so prior to bringing its federal questions to this Court, petitioner took its federal constitutional claims (as well as myriad state law challenges to this punitive damage award and the system under which it was imposed), to the Supreme Court of California in a Petition for Review. That petition was denied without dissent and, therefore, without any suggestion that the highest court of California or any of its members has any interest in placing controls on the amount of punitive damage awards as a matter of state or federal law. The record in this case is "well-developed": the California legislature has specifically authorized punitive damage awards without setting any limits whatsoever on the size of such awards and the California court system is demonstrably satisfied with, or indifferent to, the constitutional implications of its punitive damage regime.

Furthermore, this case presents an appropriate vehicle for the Court's consideration of the question whether the absence of any limit on the size of punitive damage awards is, without more, a violation of the Eighth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment or the Due Process Clause *ex proprio vigore*. In its Petition for Review, petitioner expressly argued that the absence of sufficient standards governing the imposition of punitive damages deprived it of its right, under the Due Process Clause of the Fourteenth Amendment and its California counterpart, "to appreciate and evaluate the consequences of its conduct."[5] Respondent has asserted in

---

[5] Petitioner argued, Pet. for Rev., at 19:

> This case also presents the question whether under the Due Process Clause of the California Constitution and its counterpart

this Court that the "statutory standards set forth in [§] 3294 are not unconstitutionally vague and provide sufficient guidance for the trial courts charged with implementing it." Br. in Opp., at 11. Yet *Cal. Civ. Code* § 3294, the California statute which authorizes punitive damages, contains *no standard at all* with respect to how much punishment may be imposed on a defendant pursuant to it.

Petitioner submits that it would be manifestly unjust for the Court to deny this petition solely because the Court may prefer to consider these issues first in a case in which a punitive damage award has been imposed pursuant to a state statute expressly limiting the size of such awards. Petitioner invoked both the Excessive Fines Clause and the Due Process Clause of the Fourteenth Amendment in the California courts and its reliance on those guarantees was squarely rejected. If the Court regards the question whether the absence of any limit on punitive damage awards under California law violates the Federal Constitution as one to be addressed prior to decision of petitioner's primary Excessive Fines Clause argument, then that threshold question should be viewed as "essential" to the correct disposition of the Excessive Fines Clause question and should be briefed fully on the merits and reached in this case. *See, e.g., Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.5 (1978).

B. *Bankers Life* As Applied To Question 2—The Change-in-Standards Issue

In *Bankers Life*, the Court declined to entertain the appellant's challenge under the Contract and Due Process Clauses to the imposition of liability and punishment based

---

in the Fourteenth Amendment to the United States Constitution, a punitive damage award may be imposed at all in the total absence of substantive standards in existence at the time the conduct occurred which would have enabled a defendant to appreciate and to evaluate the consequences of its conduct.

upon newly developed legal standards. The Court declined because the appellant's argument in this Court was based on what the Court characterized as a "vague appeal to constitutional principles . . . ." Slip op., at 5. In this case, there was the clearest assertion, at the earliest available opportunity, that the imposition of punitive damages based on a legal standard non-existent at the time petitioner's conduct occurred violated the Due Process Clause of the Fourteenth Amendment.[6]

C. *Bankers Life* As Applied To Question 3—The Procedural Rights Issue

In *Bankers Life*, the appellant had not included among its constitutional challenges the question of what procedures must be observed in connection with the judicial imposition of punitive damage awards. Thus, the Court had no occasion to address that question. Nevertheless, Justice O'Connor, after discussing the clear implications of cases such as *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), on the award of punitive damages, stated her view that "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits." Slip op., at 3 (O'Connor, J., concurring in part and concurring in the judgment).

Respondent has taken the position in this Court that petitioner's procedural rights argument is "frivolous" or is, in the alternative, petitioner's "Eighth Amendment claim in masquerade." Br. in Opp., at 23, 24. Petitioner's argument, at least as perceived by two members of the

---

[6] In the Supreme Court of California, petitioner expressly argued, Pet. for Rev., at 20 (footnote omitted), relying on the dictum in *Aetna Life Insurance Co. v. Lavoie*, *supra*, that no matter how that court resolved

> the conflicting decisions of the lower California courts which bear on this case, the Due Process Clause surely prevents the large imposition of punitive fines on Ohio.

Court, is manifestly not frivolous. And to the extent that the "procedures" argument is suggestive of constitutional issues similar to those embraced in petitioner's Eighth Amendment agrument, it merely illustrates the seamless web of constitutional doubts raised by the governmentally sponsored system of punishment at issue in this case. Indeed, the interplay between the Excessive Fines Clause and the Due Process Clause in this case is consistent with the fact that they are the only two provisions of our Constitution which find their roots directly in Magna Carta. Thus, it is not surprising that they are essentially fungible in the context of a practice—the imposition of punishment in civil actions—which predates Magna Carta and which that instrument of fundamental rights was intended, in part, to regulate.

CONCLUSION

The *Bankers Life* decision constitutes this Court's fourth message that governmentally sponsored punitive damage systems "must" be subjected to constitutional scrutiny by this Court. Petitioner is entitled to have its important and properly raised constitutional objections to this $5,000,000 punitive fine adjudicated by this Court in this case.

May 23, 1988

Respectfully submitted,

Of Counsel:

GEORGE C. MONTGOMERY
BRUCE M. THORNTON

MONTGOMERY, GASCOU, GEMMILL & THORNTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

Attorneys for Petitioner

**Counsel of Record*

APPENDIX

APPENDIX A

[-81-]

VII. THE $5 MILLION PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

If Downey ultimately prevails in this case, it will receive a windfall which exceeds its actual damages by an amount which would reimburse those damages some 33 times. Downey will receive this bounty not because the legislature of the State of California has determined that such rewards serve some legitimate state purpose, but rather because a jury acting from passion and prejudice, guided by erroneous instructions, has so determined.

This punitive damage award cannot be reconciled with any concept of fairness, rationality or proportionality such as have been imposed on the states of the United States either under the Eighth Amendment or the due process clause of the Fourteenth Amendment.

A. The Excessive Fines Clause of the Eighth Amendment Should be Held to Apply to Punitive Damage Awards in Civil Cases.

The Eighth Amendment expressly prohibits excessive fines. Remarkably, the United States Supreme Court has never had occasion to construe that provision. Under traditional analyses, therefore, the determination whether the excessive fines clause applies to control the punitive damage award in this case requires an examination of the [-82-] origins of the Eighth Amendment and the contemporary construction of the cruel and unusual punishment clause component of that amendment by this court.

It is important to recognize the primary aspect of punitive damage awards which is beyond dispute and which frames the excessive fines clause inquiry.

The purpose of the imposition of the $5 million punitive damage award against Ohio was twofold. First, to punish Ohio for its *oppressive willful* acts and, two, to warn or deter others from *equally reprehensive conduct.*

Ohio submits that some punishments, though not labeled "criminal" by the state, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. [See *Ingraham v. Wright*, 430 U.S. 651, 669 Note 37 (1977).] Further, if the imposition of a large fine such as the $5 million dollars awarded against Ohio in this case in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, then some very serious doubt would be cast on the continuing vitality of cases such as *Trop v. Dulles*, 356 U.S. 86 (1958) and *In re Gault*, 387 U.S. 1 (1967), which have been cited by the U.S. Supreme Court as examples of punishment administered in noncriminal proceedings to which the Eighth Amendment is applicable.

The United States Supreme Court recently re-examined the history of the Eighth Amendment and reaffirmed the pertinence of the English experience to questions arising under that amendment. *Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Ingraham v. Wright*, 430 U.S. at 664-66.

Does the Eighth Amendment apply only to a fine or penalty imposed in a criminal proceeding or does it also apply to a fine or penalty imposed in a civil proceeding where the purpose of such fine or penalty is to punish the defendant and to deter others from engaging in similar conduct? Appellant strongly urges that it does apply in civil proceedings and does apply in the case before this court.

The United States Supreme Court has clearly understood and applied the cruel and unusual punishments clause to reach certain types of [-83-] punishment which have not been imposed in criminal proceedings. Example, *Trop v. Dulles*, 356 U.S. 86 (1958). The same rationale should apply, for even more persuasive reasons, to the excessive fines clause.

Historically, the brief debate on the excessive fines clause in the First Congress, One Annals of Congress 782-83 (Gales and Seaton Eds. 1834), immediately followed the debate in the House over the proposed Fifth Amendment. *Id.*, at 781-82. Because the Fifth Amendment contained clauses that could have been thought to apply outside the context of criminal proceedings, such as the self-incrimination clause, Representative Lawrence proposed, and the House adopted, language to confine that clause "to criminal cases." *Id.*, at 782. If the framers of the Eighth Amendment had intended that its clauses not be applied outside the context of criminal proceedings, then logically a similar amendment could and would have been proposed. Thus, absent a persuasive reason to believe that the framers intended the word "fines" to encompass only monetary penalties assessed in criminal proceedings, and there is none, the presumption is against such a narrow reading and in favor of the reading which is urged by Ohio in the case now before this court.

An analysis of the English experience, similar to that undertaken in *Solem* and *Wright*, both *supra*, is also relevant to the application of the excessive fines clause to punitive damage awards in a fashion not drawn out in those cases. This experience convincingly demonstrates that the sources of our Eighth Amendment, to wit, Magna Carta and the English Bill of Rights—would have applied the principles embodied in the excessive fines clause directly to control punitive damage awards.

Punitive damages under English law, both common and statutory, originated in the same type of actions which were covered by the "excessive amercement" provision of Magna Carta. Pollock and Maitland, in their general discussion of offenses punishable by amercement or imprisonment in Thirteenth Century England set out the origins of "penal and exemplary damages" as follows:

> "Under Edward I, a favorite device of our legislators is that of giving double or treble damages to 'the party grieved'. They have little faith in 'communal accusation' or in any procedure that expects either royal officials or people in general to be [-84-] active in bringing malefactors to justice. More was to be hoped for the man who had suffered . . . and so in a characteristically English fashion, punishment was to be inflicted in the course of civil actions: it took the form of many fold reparation, of penal and exemplary damages." 2 F. Pollock and F. Maitland, *The History of English Law*, 522 (2nd Ed. 1909).

An amercement is similar to a modern day fine. It was the most common criminal sanction in Thirteenth Century England. *See* Pollock and Maitland, *supra*, pp. 513-515, and *Solem*, *supra*, at p. 284, n. 8.

There can be little doubt that double or treble damages awarded as punitive damages were regarded as an amercement under the earliest relevant English law and, therefore, presumptively were controlled by the excessive amercement provision of Magna Carta. As the U.S. Supreme Court observed in *Solem*, *supra*, "these were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." (463 U.S. at 285).

Ohio submits that the punitive damage award in this case is of the same character as the remedies which were intended to be limited by the linear antecedents of the Eighth Amendment.

Although punitive damages as awarded in the case before this court are relatively recent in the law of American Juris Prudence, there is little doubt that Blackstone would have regarded such damages as falling within the English common law definition of "fine." In Volume 3 of his commentaries, dealing with "private wrongs," Blackstone identifies no less than six instances in which civil actions for damages were maintained by private persons, where, if the plaintiff prevailed, the defendant was required to pay a fine to the Crown. 3 W. Blackstone, *Commentaries on the Law of England*, 118, 138, 179, 188, 398, 402 (1768). Here, the punitive damage award was made to Downey, not the State of California. But as Justice Rehnquist observed in *Smith v. Wade*, 461 U.S. 30 (1983), the purposes of punitive damages are not to right any wrong done to the plaintiff; indeed, Justice Rehnquist noted that, in theory, punitive damages should be paid to the State, not the plaintiff. (*Smith, supra*, at p. 50—Rehnquist, J. dissenting). *See also, Gertz v. Robert Velch, Inc.*, 418 U.S. 323, 351 (1974) ("punitive damages are private fines levied by civil juries").

[-85-] Ohio strongly urges that the $5 million punitive damage award in this case is excessive. In *Solem, supra*, the U.S. Supreme Court was presented with two substantial difficulties in applying the Eighth Amendment which are not present in the case before this court. First, four justices squarely rejected the holding that the cruel and unusual punishments clause incorporated the concept of proportionality as held by the majority. If, however, the excessive fines clause is applicable to the punitive damage award in the case before this court, then it seems indisputable that the appropriate inquiry regarding excessiveness must be an inquiry into proportionality.

Second, an inquiry into proportionality in the context of punitive damages awarded under a judicially created cause of action as here does not involve an intrusion by this court into the delicate balance of federalism which moved

the dissenters in *Solem, supra*, to observe that the proportionality review there was "nothing other than a bald substitution of individual subjective moral values for those of the legislature." *Id.*, at page 314.

Determining whether the award in this case, to wit, $5 million, is disproportionate and, therefore, excessive, is not at all complicated. Ohio was found by a jury to have wrongfully withheld payment of $123,779.65. The only available measure of proportionality is to compare those contract damages with the $5 million punitive damage award. The ratio is about the same as one month bears to three and one-half years, but, more importantly, it is the single largest punitive damage verdict affirmed in an insurance bad faith case to this date.

Other comparisons between the punishment in the case before this court with statutory schemes yield essentially the same result. For example, under R.I.C.O. 18 U.S.C. § 1961-68, a private plaintiff is authorized to bring a civil action (§ 1964) under which treble damages (plus attorneys' fees) may be recovered if the defendant can be shown, among other things, to have engaged in racketeering activity as defined under the code. Last term, the United States Supreme Court, or rather four justices of that Court, expressly observed that R.I.C.O. places defendants in the position of "facing a tremendous financial exposure (producing) a strong interest in settling the dispute." *See Sedima, S.PR.L. v. Imrex Co.*, Nos 84-648 and 84-822, Slip Opinions at 4-5, 53 [-86-] U.S.L.W. 5034, 5041 (July 1, 1985) (Marshal, J., dissenting). Yet this "tremendous financial exposure" pales by comparison the exposure to which Ohio and other insurers are subjected on a routine basis in the State of California. If Ohio had violated R.I.C.O. and caused the same amount of damages as in the case before this court, its penalty would have been $371,338.95 (plus attorney fees) instead of $5 million dollars.

Ohio suggests that this demonstration shows conclusively the excessiveness of the fine in this case and submits to the court that based upon the authorities cited and the background and history of the Eighth Amendment, that the excessive fines clause was intended to and does apply to punitive damages imposed in civil litigation in this state.

B. The $5 Million Punitive Damage Award Violates Appellant's Rights Under the Due Process Clause.

Punitive damages by definition transfer from one litigant to another a monetary recovery "in excess of . . . actual loss." *Scott v. Donald*, 165 U.S. 58, 86 (1897). Under the due process clause, property rights may be affected, or a person punished only after due process has been observed. *Ingraham, supra*, at p. 672.

Ohio submits that the imposition of punitive damages in the case before this court violates the due process clause because it confiscates a large amount of Ohio's property and transforms it into an ordinary monetary windfall to a large financial institution. The occasion for doing so is punishment for acting inconsistently with rules of conduct that have been developed by our judiciary. (Insurance Code 790-.03(h) not being involved in the case before this court).

Punitive damages are by definition arbitrary, capricious, severe and whimsical. It is not at all surprising that various members of our United States Supreme Court have expressed significant concern about the place of punitive damages in our culture, which culture places a high premium on due process of law. For example, in *Electrical Workers v. Foust*, 442 U.S. 42, at 50 (1979). Justice Marshall, on behalf of the majority, pointed out that "because juries are accorded broad discretion as to the imposition and amount of punitive damages . . . the impact of these windfall recoveries is unpredictable and potentially substantial." [-87-] And Justice Marshal [1] went on to state another danger of punitive damages—that they "may be

employed to punish unpopular defendants." *Id.*, at 50-51 Note 14.

Certainly, in the State of California insurance companies are the most unpopular defendants as evidenced by the many, many cases published and unpublished where large punitive damage awards have been imposed.

Punitive damages in California have gotten out of hand insofar as insurance companies are concerned and it is time to take a realistic look at the constitutionality of punitive damages in light of the reality of what is going on in our courts.

In *Smith v. Wade, supra*, Justice Rehnquist, writing for himself, the Chief Justice and Justice Powell, pointed out that punitive damages are generally rationalized on three grounds. First, they are "assessed for the avowed purpose of voting a *punishment* upon the defendant," 461 U.S. at 58 quoting C. McCormick, *Law of Damages*, 275 (1935) (emphasis added by Rehnquist, J.), but such a punitive fine—if it should be imposed in a civil trial at all—"should go to the state, not to the plaintiff—who by hypothesis is fully compensated." *Id.*, at page 59.

Second, Justice Rehnquist observed that punitive damages are justified as deterring "persons from violating the rights of others." *Id.*, at page 58. Where a known rule of conduct is violated, as was the situation in *Smith v. Wade, supra*, itself, the "deterrence" rationale perhaps would provide some arguably rational basis for a state's authorizing the recovery of a reasonable amount of punitive damages by a private person. Much the same as the State of California has done in the medical malpractice field.

Finally, Justice Rehnquist observed that punitive damages have been "justified as a 'bounty' that encourages private lawsuits seeking to assert legal right." *Id.* It is, however, inconceivable that California's interest in encouraging what amounts to bounty hunters lawsuits against

insurance companies bears any rational relationship to the $5 million awarded in this case.

The fundamental defects in the process afforded to Ohio in this case must be considered in the context of the fact that this punitive damage [-88-] award was imposed in a civil action "unaccompanied by the types of safeguards present in criminal proceedings." *Smith, supra,* at page 59 (Rehnquist, J., dissenting). At the very least, this absence of safeguards strongly supports the U.S. Supreme Court's applying the excessive fines clause or the due process clause with proper vigor to control the imposition of punitive damages awarded. Failure of this court to do so could be contrary to the thrust of U.S. Supreme Court cases which have already placed limits on the power of government to impose punishment on persons in civil litigation. See, for example, *United States v. Ward,* 448 U.S. 242, 248-51 (1980) and cases cited therein. These limitations particularly as they affect the size of punitive damage awards would preserve the constitutional rights of litigants while, at the same time, permitting the State of California appropriate leeway to insure adequate compensation for wrongs committed within this jurisdiction.

APPENDIX B

[-41-]

B. The Constitutional Propriety Of Punitive Damages Is Beyond Dispute.

The propriety of punitive damages is well-established in English and American law. In California, common law authority for punitive damages has been enhanced by the statutory authority of Civil Code section 3294. Despite the fact that for more than a century punitive damages awards have consistently survived constitutional assault, OHIO would have this Court completely ignore this unbroken line of precedent.

DOWNEY submits that OHIO's constitutional attack should be summarily rejected. California courts have consistently held that an "award of penal damages made under civil rules of procedure (does) not violate any constitutional right" of the party against whom the award is made. *Toole v. Richardson-Merrel, Inc.*, (1967) 251 Cal. App.2d 689, 717, 60 Cal. Rptr. 398; and *Wetherbee v. United Insurance Company of America, supra* at 18 Cal.App.3d 272.

Recently, the court in *Grimshaw v. Ford Motor Company, supra* at 119 Cal.App.3d 757, 807 and 811, affirmed the historical and legal inviolability of the doctrine of punitive damages in the following language:

> "The concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this country. (Citations omitted). The doctrine was a part of the common law of this state long before the Civil Code was adopted. (Citations omitted).
>
> • • •

[-42-]

> [The] contention that the statute (Civil Code section 3294) is unconstitutional has been repeatedly rejected. (Citations omitted)."

Nearly a century ago, the United States Supreme Court noted that a great number of judicial decisions had confirmed the constitutionality of punitive damages:

> "It is a well-established principle of the common law that, in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant. . . . We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Scott v. Donald*, (1897) 165 U.S. 58, 68, 41 L.Ed. 632, 175 S.Ct. 265, quoting *Day v. Wodworth* (1852) 54 U.S. (13 How.) 363, 371.

DOWNEY submits that nothing has changed in the last one hundred years except the publication of even more decisions rejecting these constitutional attacks.

C. The Eighth Amendment Does Not Apply To Civil Actions.

1. The Eighth Amendment Applies To Criminal Actions.

OHIO has advanced the untenable argument that punitive damages are criminal "fines" as envisioned by the Eighth Amendment which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." OHIO's meandering and frequently inaccurate discussion of the Eighth Amendment does not overcome the obvious and well-established fact that *it applies only to criminal actions.*

OHIO contends at page 82 of its Opening Brief that "some punishments, though not labeled 'criminal' by the

state, may be sufficiently analogous to criminal punishments" to justify application of the Eighth Amendment. However, the cases cited by OHIO are obviously distinguishable and do not contain any authority for OHIO's position that punitive damages are criminal punishments. In fact, the cases hold to the contrary.

OHIO relies on *Ingraham v. Wright* (1977) 430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401, for the general proposition that some civil punishments are criminal. *Ingraham* stands for no such proposition. In fact, its holding was to *not extend Eighth Amendment coverage to non-criminal proceedings*:

[-43-]

> "Bail, fines and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this long-standing limitation. . . ." *Id.*, 664.

The Court in *Ingraham* did not consider the applicability of the Eighth Amendment to punitive damages. It did, however, reiterate the long-standing rule that the scope of the Amendment is limited to criminal proceedings. If any lesson can be learned from *Ingraham*, it is that the Supreme Court's refusal to extend Eighth Amendment protection to corporal punishment in public schools, which is conceptually closer to a "criminal" punishment than civil punitive damages, is an indictment of OHIO's argument.

OHIO's reliance on *Trop v. Dulles* (1958) 356 U.S. 86, 2 L.Ed.2d 630, 78 S.Ct. 590, is similarly misplaced. In

Trop, the Court held only that denationalizatin of a citizen as a punishment is improper. In doing so, the Court "recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and non-penal effect." *Id.*, 96. The Court reasoned that loss of citizenship by reason of one's court-martial conviction for wartime desertion was actually a criminal sanction. The narrow and distinguishable holding of *Trop* is misconstrued by OHIO.

OHIO has also misapprehended the holding in *In Re Gault* (1967) 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428. In *Gault*, the Court merely determined that a juvenile who was committed to a detention facility for up to six years without notice to his parents, within one day of being taken into custody, without the complainant's presence at the hearing, with no sworn testimony, and without having been advised of his rights had been deprived of his due process rights. The Court did not pass on the applicability of the Eighth Amendment, but confined its holding to a determination that the Fourteenth Amendment imposes certain safeguards when the State seeks to commit a juvenile to an institution for delinquency. The proximity of that situation to the typical criminal proceeding is obvious. Among other similarities, in both cases the State is the plaintiff and the accused stands to lose his freedom. The *Gault* situation, and the *Trop* situation for that matter, is a far cry from the instant one.

[-44-]

Even when characteristics which are associated with the criminal process are present, most notably, the government occupying the position of "plaintiff" to enforce a particular statute, the courts are able to distinguish that which is criminal and that which is civil. In *Bell v. Wolfish* (1979) 441 U.S. 520, 60 L.Ed.2d 447, 99 S.Ct. 1861, for instance, the Court held that pretrial detention was not a "penal" sanction, but merely a valid regulatory restraint.

The Court determined that while such detention may interfere with one's "desire to live as comfortably as possible and with as little restraint as possible during confinement," it "does not convert the conditions or restrictions of detention in to 'punishment.' " *Id.*, 537. Accordingly, the Court did not invoke the Eighth Amendment. Surely if actual confinement by the government in connection with a pending criminal proceeding is not a criminal punishment under the Eighth Amendment, civil punitive damages awards cannot be characterized as such.

In *United States v. Stangland* (7th Cir. 1957) 242 F.2d 843, 848, the court held that the United States government's suit to recover statutory penalties for exceeding farm marketing quotas was a suit "to recover civil penalties; consequently, the Eighth Amendment argument is inapposite." In *Zwick v. Freeman* (2d Cir. 1967) 373 F.2d 110, 119, *cert. den.* 289 U.S. 835, the court rejected a constitutional argument similar to that raised in *Stangland* by observing that while Eighth Amendment "protection may have been extended beyond technically criminal sanctions to those criminal in nature (citing *Trop v. Dulles, supra*), it is not applicable to purely civil penalties."

In *United States v. Johnson* (W.D.Mo. 1968) 284 F.Supp. 273, 278 *aff'd* 410 F.2d 38, *cert. den.* 396 U.S. 822, the court found that a defendant could be convicted of a statutory offense and remain liable to the government for civil penalties prescribed by the statute. The court held that the imposition of criminal and civil penalties did not subject the defendant to excessive fines under the Eighth Amendment. If an action by the government itself to recover fines for violations of the law does not constitute a criminal proceeding under the Eighth Amendment, then a civil action for punitive damages by a private litigant clearly is not a proceeding which is criminal in nature. This proposition was reaffirmed in *Dalton v. Bob Neill Pontiac, Inc.* (M.D.N.C. 1979) 476 F.Supp. 789, 797, fn. 13, *aff'd*, 628 F.2d 1348, where the court flatly stated that

the Eighth Amendment's prohibition against excessive fines is only "applicable to those convicted of crimes."

Because of the dearth of authority in support of its position, and the wealth of authority against it, OHIO has chosen to rely on dicta, and dissenting and [-45-] minority opinions in cases which are irrelevant or inapposite. For instance, OHIO relies on *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997, for the proposition that "punitive damages are private fines levied by civil juries." This passage is dictum which was used to explain the Court's narrow holding that "a private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times (v. Sullivan) may recover only" actual damages. *Id.*, 350. Contrary to being an attack on punitive damages, this passage and the rest of the decision affirm the propriety of awarding punitive damages in cases where a defamation plaintiff proves knowledge of falsity or reckless disregard for the truth.

In its citation of *Smith v. Wade* (1983) 461 U.S. 30, 75 L.Ed.2d 632, 103 S.Ct. 1625. OHIO elects to completely disregard the majority opinion that upholds an award of punitive damages under 42 U.S.C. § 1983 where evil motive or reckless indifference to the rights of others is proven. Instead, OHIO relies on Justice Rehnquist's dissenting opinion which, while reflecting the justice's unfavorable predisposition toward punitive damages in general, states that punitive damages under the statute would be appropriate if improper motive were established. In effect, even this dissenting opinion recognizes the validity of punitive damages.

OHIO's review of the historical underpinnings of the Eighth Amendment, complete with speculation as to how Blackstone would regard punitive damages were he thrust into this century, is inaccurate as well as irrelevant. One need look no further than the United States Supreme Court

opinion in *Ingraham v. Wright, supra,* for evidence of OHIO's specious reasoning. That opinion traces the historical antecedents of the Eighth Amendment and it concludes that "the exclusive concern of the English version (of the Eighth Amendment) was the conduct of judges in enforcing the criminal law." *Id.*, 665. The Court further explored the development of the English version:

> "Although the reference to 'criminal cases' was eliminated from the final draft [of the English version], . . . the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions [excessive bail, excessive fines and illegal punishments] as bearing only on criminal proceedings and judgments." *Ibid.*

The *Ingraham* Court went on to discuss the development of the American version of this rule:

[-46-]

> "But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply—the criminal process—was the same." *Id.*, 666.

The *Ingraham* the Court held that the Eighth Amendment is "inapplicable" outside the criminal process. Accordingly, the Court found no reason to wrench the Eighth Amendment from its historical context by extending its coverage to non-criminal matters. *Id.*, 669.

In *Solem v. Helm* (1983) 463 U.S. 277, 290, 77 L.Ed.2d 637, 103 S.Ct. 3001, the Court determined whether a particular prison sentence was cruel and unusual punishment by applying the rule that the punishment must be proportional to the crime. The dissimilarity of *Solem* to the case at bench is apparent even to OHIO who admits at

page 85 of its Opening Brief that the two are completely distinguishable.

In short, OHIO's argument that the Eighth Amendment applies to civil damages is unsupported by history, judicial precedent and common sense. OHIO has advanced no support for its position. The only cases on point hold that the Eighth Amendment is not applicable to civil damages. The courts have not had any difficulty in distinguishing between that which is "criminal" and therefore within the scope of the Eighth Amendment, and that which is "civil" and therefore outside its protections. Punitive damages are clearly in the latter category.

2. Assuming Arguendo That The Eighth Amendment Does Apply To Civil Actions, The Issue Of "Excessiveness" Of The Damages Is A Question Of Fact For The Trier Of Fact.

Even if it be assumed, *arguendo*, that the Eighth Amendment applies to civil punitive damages, it prohibits only "excessive" fines. Consequently, the issue of whether or not the subject award of punitive damages is excessive is for the trier of fact to determine. *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 496, 136 Cal.Rptr. 132. Moreover, the trier of fact has adequate guidelines and standards for making such a determination under Civil Code section 3294. As demonstrated in the preceding sections of this brief, the award of punitive damages in the case at bar is consistent with these accepted standards.

D. OHIO's Fourteenth Amendment Due Process Rights Are Not Violated By The Punitive Damages Award.

OHIO's claim that the punitive damages award violates its due process rights under the Fourteenth Amendment is, in actuality, not a claim of violation of due process at all. OHIO does not identify a single procedural [-47-] safeguard which it contends it was denied. OHIO does not claim that it was denied an opportunity to be heard, or that traditional notions of fair play were not applied, or

that articulated rules of procedure and standards of adjudication were not followed. Rather, OHIO is once again urging that criminal rules of procedure be applied to a civil proceeding. In other words, OHIO's due process claims are simply its Eighth Amendment claim in masquerade. They are no more compelling in this guise.

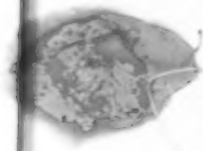
Initially, OHIO has advanced not a single authority for the proposition that punitive damages awarded pursuant to civil rules offend the Fourteenth Amendment's due process clause. That is because there is no such authority. Moreover, the foregoing discussion regarding the overall constitutionality of punitive damages makes it clear that such due process arguments have been rejected each time they have been asserted. *See, Scott v. Donald, supra; Toole v. Richardon-Merrell, Inc., supra;* and *Grimshaw v. Ford Motor Co., supra.*

OHIO misstates the holding in *International Brotherhood of Electrical Workers v. Foust* (1979) 442 U.S. 42, 60 L.Ed.2d 698, 99 S.Ct. 2121. What OHIO characterizes as a broadside levelled at the notion of punitive damages in general is actually nothing more than a narrow holding that punitive "damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance." *Id.*, 52. The relationship of *Foust* to the instant case is nonexistent.

OHIO relies on the dissenting opinion in *Smith v. Wade, supra*, for support of its argument. It has already been established that *Smith* is distinguishable and, to the extent it is relevant, it upholds the validity of punitive damages. However, OHIO does not even place itself within the rationale of the dissent on which it relies. In this regard, OHIO concedes at page 87 of its Opening Brief that the deterrent effect of punitive damages is valid and provides a "rational basis" for the recovery of punitive damages.

OHIO's claim that punitive damages are barratrous is unrelated to the issue of due process. In the first place,

the unfounded assertion that the prospect of punitive damages may encourage some litigants to pursue lawsuits is immaterial to whether or not such damages are proper. In the second place, such an assertion has no bearing on the constitutionality of such damages in general, or on the purported and unnamed fundamental defects in the process afforded to OHIO in this case.



In essence, OHIO is simply contending, without benefit of reasoned analysis or precedent, that the types of safeguards present in criminal [-48-] proceedings should be applied to civil suits. OHIO has also dressed up straightforward arguments regarding the size of the award herein in constitutional raiment. Upon scrutiny, these constitutional pretensions peel away and OHIO's claims are reduced to no more than an attack on the size of the punitive damages award. That issue is discussed at length elsewhere in this brief, and it is sufficient to say that it falls far short of a denial of due process of the law.